

CRIMINAL YEAR SEMINAR

March 12, 2010 - Tucson, Arizona
March 19, 2010 - Phoenix, Arizona
March 26, 2010 - Mesa, Arizona



STATE v. FISH STATE'S ARGUMENT

Presented By:

JOSEPH MAZIARZ
Assistant Attorney General
Phoenix, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

1951 W. Camelback Road, Suite 202
Phoenix, Arizona 85015

PAUL W. AHLER
EXECUTIVE DIRECTOR

ELIZABETH ORTIZ
SENIOR STAFF ATTORNEY

And

CLE WEST
2929 N. Central, Suite 1500
Phoenix, Arizona 85012

Under well-established Arizona law, evidence of a victim's prior specific acts of violence or aggression is not admissible in a homicide prosecution to prove the defendant's version of events (justification) *unless* the defendant was personally aware of the prior acts. *See, e.g., State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991) (a murder defendant who defends on the basis of justification may introduce evidence of specific acts of violence by the deceased "if the defendant either observed the acts himself or was informed of the acts before the homicide"); *State v. Connor*, 215 Ariz. 553, 558–59, ¶¶ 13–16, 161 P.3d 596, 601–02 (App. 2007) (defendant raising justification defense may not present evidence of the victim's "specific instances of violence" unless he knew of them; otherwise, defendant is limited to presenting "reputation or opinion evidence"); *see also* Ariz. R. Evid. 404(a), 404(b), 405.

Appellant's reliance upon *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009) is woefully misplaced. In *Fish*, the court acknowledged the general well-established rule:

We conclude that the superior court properly excluded the specific act evidence for the purpose of showing Defendant's state of mind and the reasonableness of his response. *Defendant admits he was not aware of such acts at the time of the shooting and Rule 404(b) prohibits use of such evidence for that purpose.*

222 Ariz. at 122, ¶ 40, 213 P.3d at 271 (emphasis added). However, given

the unique and *sui generis* facts of that case, the court held that the victim's prior violent acts ("most of which surrounded instances involving his dog," ¶ 7) were admissible (subject to "appropriate weighing under Rule 403," ¶ 53), but clearly limited its holding to *that case only*:

This does not mean that in any self-defense claim prior acts of a victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant's claim. We conclude such evidence *may* have been admissible for corroboration *in this case because of the nature of the record*. Defendant conceded that he shot the Victim and gave specific facts to police, the grand jury and witnesses of the events leading up to the shooting. His description of the Victim's conduct given immediately after the shooting is very similar to proffered evidence of prior acts of the Victim of which Defendant did not know when he made those statements. *There was no other witness to the shooting who could testify*. The State contested the credibility of the Defendant's statements about the events leading up to the shooting, contending that the Victim probably was only trying to collect the dogs. *On this record* those prior acts were highly relevant to the credibility of the self-defense claim.

Id. at 126, ¶ 49, 213 P.3d at 275 (emphasis added).

[Put in summary of facts of case]. These "facts" do not remotely resemble the facts in the *Fish* case. *Fish* is clearly distinguishable.

Moreover, *Fish* was wrongly decided in holding that prior violent acts of a victim, unknown to the defendant at the time of the alleged crime, are *ever* admissible under Rule 404(b) of the Arizona Rules of Evidence. After acknowledging the existence of well-established Arizona law (including

Arizona Supreme Court precedent) the court inexplicably relied solely upon an inapposite Minnesota appellate court decision, *Gorman v. State*, 619 N.W.2d 802 (Minn. App. 2000), in holding that the other act evidence was admissible to “corroborate Defendant’s description of what he faced just prior to the shooting,” and “to rebut the State’s argument that Defendant fabricated or exaggerated the victim’s acts on the date of the shooting.” 222 Ariz. at 124, ¶ 46, 213 P.3d at 273.

The court’s reliance on the Minnesota case is puzzling. In *Gorman*, the defendant killed the victim in a bar fight and, at trial, the defendant testified that the victim “was boasting that he had just spent 18 years in prison for a double murder” and was threatening the defendant with what he “believed was a gun or other weapon.” 619 N.W.2d at 804. Following his conviction, the defendant filed a petition for post-conviction relief, claiming newly-discovered evidence and a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), flowing from the state’s failure to disclose “the victim’s true identity, prior murder convictions, prior assaultive conduct, and prior contacts with St. Paul police” which would have bolstered the defendant’s trial testimony and his claim of self-defense. *Id.* The trial court summarily denied the petition, but the Minnesota Court of Appeals remanded the matter for an evidentiary hearing to determine whether the defendant was

prejudiced by the state's failure to disclose this evidence which was in the constructive possession of the prosecutor and may have "bolstered [the defendant's] self-defense claim and his credibility." *Id.* at 806–07. In *Gorman*, the defendant had *actual knowledge* of the victim's prior acts of violence — the victim *told him* he had committed a "double murder." *Id.* at 804. Thus, the court's holding in *Fish* is bereft of *any* legal support.

Thus, although clearly distinguishable and *sui generis*, *Fish* was wrongly decided. This Court must follow Arizona Supreme Court precedent (*Taylor*) and reject *Fish*. See *State v. Smyers*, 207 Ariz. 314, 318 n.4, 86 P.3d 370, 374 n.4 (2004); *State v. Robles*, 213 Ariz. 268, 273, ¶ 17, 141 P.3d 748, 753 (App. 2006).

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